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No. 89-1401

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1989

EXXON CORPORATION,
*Petitioner,*
VS.
WYOMING STATE BOARD OF EQUALIZATION,
*Respondent.*

After Decision by the Supreme Court of Wyoming
No. 88-132 (December 7, 1989)

## MOTION OF INSTITUTE OF PROPERTY TAXATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF EXXON CORPORATION

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*TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THIS COURT:*

The Institute of Property Taxation (the "Institute") does hereby respectfully request leave to file the accompanying brief of *amicus curiae* in this case in support of the petition seeking certiorari.

The Institute has requested of the Office of the Attorney General for the respondent, the State of Wyoming, its consent to the filing of such a brief, but such consent has been refused. Petitioner herein has, pursuant to a letter dated April 3, 1990 from Alan Poe, Esq. of Holland & Hart, the counsel of record for the petitioner, consented to the filing of such a brief.

The Institute contends that the decision of the Supreme Court of Wyoming set forth in Appendix A of the Petition for Writ of Certiorari filed herein creates not only actual multiple tax burdens on, and discrimination against, interstate commerce, but also a precedent contrary to the decisions of this Court and a strong likelihood of the expansion of such burdens and discrimination.

The interest of the Institute, which maintains its offices at 888 Seventeenth Street, N.W., Suite 1150, Washington, D.C. 20006, is based upon the following facts.

The Institute is a not-for-profit corporation organized under the laws of the District of Columbia. It is dedicated to fostering and promoting uniform and equitable administration of ad valorem, sales and use taxes, and other forms of state and local taxes, excepting income taxes. To achieve the goal of uniform and equitable administration of state and local taxation, the Institute utilizes the promotion of education and professionalism of its members, and the collection and exchange of useful information and assistance among its members, and emphasizes cooperation with governmental bodies in improving state and local tax administration, and the establishment and promotion of high standards of competence and efficiency in tax management. The goals of the Institute are to be reached in part by review and dissemination of information, in part by the sponsorship of educational functions and the award of professional designations in the field of property and sales and use taxes, and in part through the adoption of ethical codes to be utilized by the members of the Institute.

The Institute, in addition to its bylaws, has a written code of ethics whereby each member agrees that he or she shall be professional and objective in performing responsibilities with government, the public and fellow members; shall assume an obligation to develop the sound administration of property and of state and local tax law and the adoption of equitable tax legislation; shall conduct himself or herself with due regard for the interests of society, as well as those of his or her company and its employees; shall endeavor to establish valuations and all other tax liabilities in accordance with acceptable practices and standards; and shall employ outside representatives upon the basis of technical competence, having due regard for the highest standard of professional ethics.

The Institute has approximately 2,800 members, in virtually every state in the union and in a number of the provinces of Canada. It has been conducting conferences and educational seminars in the fields of property taxation and sales and use taxation since 1977. It maintains standing committees and schools in both the areas of sales and use tax and property taxation.

A substantial number of members of the Institute will be affected by decisions of the nature of the Wyoming Supreme Court ruling to which the petition is directed. A substantial number of employees of the members of the Institute responsible for tax policy and compliance and their professional advisors, such as member accountants and lawyers, not to mention manufacturers shipping goods throughout the United States, will be affected by the decision.

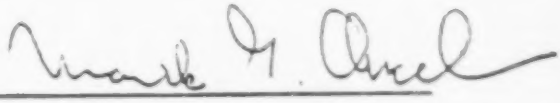
Of greater importance to the Institute and its members, however, is the fact that the Wyoming decision permits a state to utilize an unapportioned use tax which grants no credit for a similar tax properly paid to another state and

imposed upon identical property in interstate commerce. The decision creates an immense compliance problem for the members who ship or receive goods through the use of interstate commerce. The result of the decision is to create an impermissible burden upon, and discrimination against, interstate commerce. As indicated by the dissent of one of the five Wyoming justices, the Wyoming use tax is a double tax imposed upon interstate commerce. Furthermore, the Wyoming decision appears to take inconsistent positions and ignores the complementary nature of sales and use taxes.

The Institute believes that there is a need to reassert the primacy of the Commerce Clause and to utilize the tests for imposition of a burden upon commerce articulated by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977), an income tax case, but adopted by this Court and reaffirmed by it in cases involving excise taxes analogous to or designated as sales or use taxes such as *Goldberg v. Sweet*, 488 U.S. ____, 102 L. Ed. 2d 607, 616, 109 S. Ct. 582, 590 (1989), and *D. H. Holmes Co. v. McNamara*, 485 U.S. ____, 100 L. Ed. 2d 21, 26-28, 108 S.Ct. 1619, 1623 (1988).

Therefore, leave of this Court is respectfully requested to file the accompanying brief of *amicus curiae* Institute of Property Taxation in support of the petition for writ of certiorari filed by Exxon Corporation in the above-entitled matter.

Respectfully submitted,

By 

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## BRIEF OF AMICUS CURIAE, INSTITUTE OF PROPERTY TAXATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## PRELIMINARY STATEMENT

The interstate commerce aspects of this case are undisputed. Petitioner purchased 24-inch line pipe from a Texas vendor to be shipped by its supplier in Japan to Portland, Oregon. In turn, the pipe went by rail to the Energy Coating Company near Fort Collins, Colorado, where title to the pipe passed to petitioner at the rail yard.

The pipe was unloaded, inspected, sandblasted and finally treated with a thin film of epoxy, which took approximately 90 to 120 days. The pipe was then transported to petitioner's Wyoming contractor where it was installed as a part of the petitioner's Wyoming pipeline.

It was determined that the seller of the pipe had not collected Colorado sales tax which was due, and accordingly, the petitioner filed an amended Colorado sales tax return and paid a compensating use tax measured by the same percentage of sales tax as would be required on the purchase price pursuant to the Colorado statutes.

Subsequently, the Wyoming Department of Revenue and Taxation conducted an audit with respect to the activities of the petitioner in Wyoming and assessed a Wyoming use tax against the use of the pipe in Wyoming at the rate of four percent (4%) of the purchase price of the pipe, plus interest. The Wyoming Department of Revenue refused to grant a credit against this assessment for the tax already paid by the petitioner to Colorado.

The Wyoming State Board of Equalization had found that the State of Wyoming was a member of the Multistate Tax Compact until it withdrew in 1978. One of the major reasons for such withdrawal was the fact that the Multistate Tax Compact requires credit against Wyoming use tax if a sales or use tax was first paid to another state which imposed such a tax. Thereafter, the Wyoming Department of Revenue had provided notice that credits would not be provided for use taxes paid to another state, and this has been the consistent policy of Wyoming since 1978. Apparently, Wyoming does not impose a use tax where goods are delivered to the state for storage or other taxable services with an ultimate destination and use in another state, although services such as repair or fabrication which occur while in state are subject to Wyoming sales tax.

The Wyoming Supreme Court held, by a four-to-one vote, that the first use of the pipe occurred in Wyoming and not in Colorado, and that the Wyoming use tax was therefore properly imposed under Wyoming law. The

court further held, by the same vote, that Wyoming law did not provide for the granting of a credit against the Wyoming use tax for the Colorado use tax because of the very nature of the payment to Colorado, and that such a payment did not violate the Commerce Clause of the United States Constitution. The dissent observed the inconsistency of the decision as to the use in Colorado and the argument that the Colorado tax was a use tax, and concluded that, in fact, the actions of Wyoming did violate the Commerce Clause of the United States Constitution.

## THE LAW APPLICABLE TO TAXATION OF GOODS IN INTERSTATE COMMERCE

The decision of the Wyoming Supreme Court fails to consider the history and the reasons for the requirement of apportionment of use taxes in the above-described factual context.

Prior to the decision in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 51 L. Ed. 326, 97 S. Ct. 1076 (1977), there had been a number of cases decided by the Court which seemingly went off on the basis of whether the tax had been a sales or a use tax. Thus, in *McLeod v. Dillworth Co.,* 322 U.S. 327, 88 L. Ed. 1304, 64 S. Ct. 1023 (1944), the Supreme Court had by a narrow margin held that a sales tax may not, in light of the Commerce Clause, be imposed by a state on sales to residents of the state which are consummated by acceptance of orders in, and the shipment of goods from, another state in which title

passes upon delivery to the carrier. A further distinction occurred as a basis for the constitutional differentiation on the theory that if called a sales tax, there was a substantial constitutional difference, because a sales tax is one on the freedom of purchase while a use tax is a tax on the enjoyment of what was purchased.

On the same day, the Court decided *General Trading Co. v. State Tax Commission of the State of Iowa,* 322 U.S. 335, 88 L. Ed. 1309, 64 S. Ct. 1028 (1944). In that case, Justice Frankfurter, who had delivered the opinion in *McLeod v. Dillworth Co., supra,* sustained an Iowa use tax while affirming the fact that no state can tax the privilege of doing interstate business. He articulated in his decision the reasoning utilized subsequently in *Complete Auto Transit, Inc. v. Brady, supra,* to the effect that the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a state, to the upkeep of which he may be asked to bear his fair share. Justice Frankfurter went on to state that a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. *General Trading, supra,* 322 U.S. at 338. Justice Frankfurter then continued, in sustaining the use tax, to note that it was what it professed to be: a nondiscriminatory excise tax laid on all personal property consumed in Iowa.

On the same day, the Court also decided *International Harvester Co. v. Department of Treasury of the State of Indiana,* 322 U.S. 340, 88 L. Ed. 1313, 64 S. Ct. 1019 (1944). This case involved income taxes paid in respect of transactions in interstate commerce. Justice Rutledge, in concurring with the decision in *International Harvester* and *General Trading,* and dissenting in the *McLeod* case,

discussed the Commerce Clause at greater length. *International Harvester, supra,* 322 U.S. 358. He most clearly set forth the matter which is the issue in this case and which *Complete Auto Transit, Inc. v. Brady, supra,* met through the four-prong test which it adopted:

> "In these interstate transactions cases involving taxation by the state of origin or that of market, the trouble arises, under the commerce clause, not from any danger that either tax taken alone, whether characterized as 'sales' or 'use' tax, will put interstate trade at a disadvantage which will burden unduly its competition with the local trade. So long as only one tax is applied and at the same rate as to wholly local transactions, no unduly discriminatory clog actually attaches to the interstate transaction of business.
>
> "The real danger arises most obviously when both states levy the tax. Thus, if in the instant cases it were shown that, on the one hand, Arkansas and Iowa actually were applying a 'use' tax and Tennessee and Minnesota a 'sales' tax, so that in each case the interstate transaction were taxed at both ends, the heavier cumulative burden thus borne by the interstate business in comparison with the local trade in either state would be obvious. If in each case the state of origin were shown to impose a sales tax of three per cent and the state of market a use tax of the same amount, interstate transactions between the two obviously would bear double the local tax burden borne by local trade in each state. This is a difference of substance, not merely one of names, relevant to the problem created by the commerce clause, though not to that of 'jurisdiction' under due process conceptions. And the difference would be no less substantial

> if the taxes levied by both the state of origin and that of market were called 'sales' taxes or if, indeed, both were called 'use' taxes."

*International Harvester, supra,* 322 U.S. at 358-359.

This Court has recognized the problem posed by Justice Rutledge through the tests set forth in *Complete Auto Transit, Inc. v. Brady, supra,* in the excise tax context, in which the Court based its decision on the fact that the tax avoided the risk of multiple taxation for transactions involving interstate commerce.

Thus, in *D. H. Holmes Co. v. McNamara,* 485 U.S. ____, 100 L. Ed. 2d 21, 108 S. Ct. 1619 (1988), in the discussion by the Court of the Commerce Clause, the Court emphasized the preeminence of *Complete Auto Transit, Inc. v. Brady* and the four-prong test of substantial nexus, fair apportionment, nondiscrimination against interstate commerce, and fair relationship to the benefits provided by the state. *Complete Auto Transit, supra,* 430 U.S. at 287, 51 L. Ed. 2d 326, 97 S. Ct. 1076.

Having determined that the issue of whether or not goods involved in interstate commerce could be taxed, the Court made its four-prong analysis. In discussing the second and third elements, of fair apportionment and lack of discrimination, the Court observed that those tests were satisfied because the Louisiana statute provides a credit against its use tax for sales taxes that have been paid in other states, and that it was equal to the sales tax applicable to the same tangible personal property purchased in state. *D. H. Holmes Co., supra,* 100 L. Ed. 2d at 28.

In the case at bar, there is no issue relating to either nexus or fair relationship to benefits provided by the state. The real issue here is the fair apportionment issue.

Thus, the real distinction which Wyoming seeks to make is one which ultimately would create chaos within the system of taxation as enunciated by *Complete Auto Transit, Inc. v. Brady* and its progeny, namely, that the first use of the goods occurred within the State of Wyoming, and that the inspection, sandblasting and coating in the State of Colorado apparently was irrelevant. *See* Appendix B to Petition for Writ of Certiorari at page A-27. This also appears to be the position of the Wyoming Supreme Court. *See* Appendix A to Petition for Writ of Certiorari, at pages A-6 and A-7. From this, the Wyoming Supreme Court concluded that the second prong of *Complete Auto Transit, Inc. v. Brady* was met because the tax is only on the use of the pipe in Wyoming. This conclusion begs the very issue presented by the facts of the case and flies in the face of the determinations made by this Court in cases involving interstate commerce.

In *Goldberg v. Sweet*, 488 U.S. ____, 102 L. Ed. 2d 607, 109 S. Ct. 582 (1989), Illinois imposed a five percent excise tax on the gross charge of interstate telecommunications originating or terminating in that state. The tax was called a telecommunications excise tax. The Illinois Supreme Court, in *Goldberg v. Johnson* (the predecessor of Sweet), 117 Ill. 2d 493, 512 N.E.2d 1262 (1987), found that the Illinois unapportioned tax, albeit "constitutionally suspect" because of the risk of multiple taxation, nevertheless did not burden interstate commerce. The Illinois Supreme Court reasoned that as to the calls terminating in Illinois and charged to an Illinois service address, even though there was a real risk of multiple taxation (*Id.* at 502, 512 N.E.2d at 1267) (*e.g.*, a collect call), such a risk was eliminated by the provisions of the act which gave a credit for taxes levied by the originating state. In discussing this apportionment feature at page 616 of 102 L. Ed. 2d and in citing a number of the cases

on combination and apportionment for the purposes of income tax, the Court reverted to the internal and external consistency requirement. It stated at page 617 of 102 L. Ed. 2d: that the tax act is internally consistent, for if every state taxed only those interstate phone calls which are charged to an in-state service address, only one state would tax each interstate telephone call.

In discussing the external consistency test, the Court described that test to be whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. The Court observed that the tax in question had many of the characteristics of a sales tax and that such a retail purchase is not a purely local event, since it triggers simultaneous activity in several states, and that it recognized if the service address and billing location of a taxpayer are in different states, some interstate telephone calls could be subject to multiple taxation. The Court then stated that to the extent that other states' telecommunications taxes impose a risk of multiple taxation, the credit provision contained in the Illinois tax act operated to avoid actual multiple-taxation, citing *D. H. Holmes Co., supra,* at 100 L. Ed. 2d 21 with respect to the statement above quoted relating to a credit against use tax for sales taxes paid in other states. The Court then concluded:

> "In sum, we hold that the Tax Act is fairly apportioned. Its economic effect is like a sales tax, the risk of multiple taxation is low, and actual multiple taxation is precluded by the credit provision. . . ."

*Goldberg v. Sweet, supra,* 102 L. Ed. 2d at 619.

It is, thus, clear that since there is no credit granted in the act of Wyoming for use taxes or sales taxes paid in

other states, the Wyoming Supreme Court has incorrectly analyzed the manner in which an excise tax may be applied to goods originating in interstate commerce.

## CONCLUSION

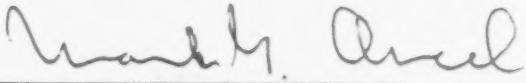
If a taxing jurisdiction may, by the simple expedient of ignoring the realities of transportation and activities within interstate commerce, provide that the first taxable use occurs in the destination taxing jurisdiction, then the second prong of *Complete Auto Transit, Inc. v. Brady, supra,* and the reason for its requirement can be ignored with impunity, and the ingredients will then exist for absolute chaos within the field of interstate commerce, particularly fields such as telecommunications technology. Thus, the Court observed in *Goldberg v. Sweet, supra,* 102 L. Ed. 2d 607, 613, n.4, that there are at least ten states in addition to Illinois, as well as three municipalities, imposing taxes on telephone calls and telecommunications generally. The permutations and combinations and possibilities of mischief in the area of interstate commerce are unlimited when one considers the number of times during which a sales or use tax may be applicable in an originating jurisdiction and thereafter, again, in a destination jurisdiction.

Those states who themselves are members of the Multistate Tax Compact recognize the necessity of allowing a credit for a use tax paid in an originating jurisdiction where similar tax is paid in a destination jurisdiction. Wyoming ignores the fact that the transaction for which it collected tax was but a part of a unitary interstate transaction, and that each of the states involved could properly tax the receipts for the activities within the state. Wyoming should not be permitted by the simple artificial doctrine of first use to ignore the requirement of

apportionment of tax between the various states involved in a unitary interstate transaction.

The petition for writ of certiorari filed by Exxon Corporation should be granted, in order to settle the matter of unapportioned taxation where the states have taxed the activity involving interstate commerce.

Respectfully submitted,

By 

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## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On April 6, 1990, I served the within Motion for Leave to File Brief as Amicus Curiae and Brief in Support of Petition for Writ of Certiorari of Exxon Corporation "Exxon Corporation vs. Wyoming State Board of Equalization" in the United States Supreme Court, October Term 1989 No. 89-1401; on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 6, 1990, at Los Angeles, California.

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CE CE MEDINA